LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 6 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. **890**

SAMUEL GILBERT, *et al.*, stockholders of GLEN ALDEN CORPORATION, suing on behalf of themselves and all other Stockholders of said Corporation, and for the benefit of and in the right of said GLEN ALDEN CORPORATION,

Petitioners,

against

FRANCIS O. CASE, DUDLEY G. LAYMAN, ALBERT A. LIST, ROYAL B. LORD and GLEN ALDEN CORPORATION,

Respondents.

Petition for Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

ROBERT L. BOBRICK,
Attorney for Petitioners,
345 Eighth Avenue,
New York, N. Y. 10001
212 CH 2-2282.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1967

(8564)

Table of Contents.

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
1. Where the Presiding Justice of an appellate court solicits and receives for a "charitable" organization founded and organized by himself and of which he is president $19,625 from the chief defendant prior to argument of an appeal and $66,500 thereafter have petitioners been deprived of "due process of law" and "equal protection of the laws" within the meaning of the 14th Amendment when they lose the appeal by a 3 to 2 vote in which the deciding vote is cast by said Presiding Justice?	3
2. Is Canon 25 of the Canons of Judicial Ethics of the American Bar Association requiring that "a Judge * * * should not solicit for charities" a mandatory prohibition under the "due process" and "equal protection" clauses of the 14th Amendment?	3
3. Where petitioners only learned of the payments of money 6 years after the Appellate Division decision, did the Appellate Division and the New York Court of Appeals fail to discharge their Constitutional duties under the 14th Amendment and Section 14 of the Judiciary Law of the State of New York by refusing, *without opinion*, to give petitioners any relief upon disclosure of the facts herein?	3

Page

4. Did the courts below violate the rule of this Court in *Hansberry v. Lee,* 311 U. S. 32, requiring a "disinterested judge" in all class actions? 3

Constitutional Provisions, Statute and Canon Involved 4

A. United States Constitutional Provisions Involved 4

B. New York Statutory Provision Involved 4

C. Canons of Judicial Ethics 4

Statement of the Case 5

Reasons for Granting the Writ 8

I. The admitted conduct of Presiding Justice Beldock in accepting prior to argument $19,625 for a so-called "charitable" organization of which he was founder, organizer and president, from respondent and chief defendant Albert A. List violates "The equal protection of the laws" and "due process" clauses of the 14th Amendment, and is squarely within the prohibition of Canon 25 of the Canons of Judicial Ethics of the American Bar Association requiring that "a Judge * * * should not solicit for charities" 8

Solicitation for Charity 9

Page

II. The disqualification of Mr. Justice Beldock rendered the order of reversal of June 12, 1961, of the Appellate Division utterly void and the refusal of that Court to vacate it did not conform with "due process" and "equal protection" of petitioners as minority stockholders in a class action 9

The word "interest" as used in Judiciary Law, Section 14, clearly includes conduct prohibited by Canon 25 of the Canons of Judicial Ethics. Such conduct is automatic disqualification and not subject to waiver 10

CONCLUSION 11

CITATIONS.

Page

CASES:

Bridges v. California, 314 U. S. 252 ..... 10, 11

Gilbert v. Burnside, Misc. 2d , 197 N. Y. S. 2d 623 5

Hansberry v. Lee, 311 U. S. 3, 9

Low v. Rice, 8 Johnson (N. Y.) 409 10

Moers v. Gilbert, 175 Misc. 733, affd. 261 App. Div. 957 10

Mozarkel v. Mozarkel, 224 N. Y. 342 6

Oakley v. Aspinwall, 3 N. Y. 547 10

Seward v. Tasker, 143 N. Y. S. 264 11

Tumey v. Ohio, 273 U. S. 510 ..... 9, 10, 11

Van Arsdale v. King, 155 N. Y. 325 ..... 6, 7

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment 4

STATUTE:

New York Judiciary Law, Section 14 ..... 4, 9

CANONS OF JUDICIAL ETHICS:

Canon 25 ..... 4-5, 9

Index to Appendix.

	Page
Appendix A	A1
Order Appealed From	A1
Notice of Motion	A2
Affidavit of Robert L. Bobrick, Read in Support of Motion	A4
Notice of Submission of Affidavits in Opposition	A11
Affidavit of Arthur F. Driscoll, Read in Opposition to Motion	A12
Affidavit of John E. F. Wood, Read in Opposition to Motion	A14
Affidavit of William D. Friedmann, Read in Opposition to Motion	A15
Affidavit of William F. Whitman, Read in Opposition to Motion	A17
Affidavit of Albert A. List, Read in Opposition to Motion	A19
Reply Affidavit of Robert L. Bobrick, Read in Support of Motion	A21
Appendix B	A25
Order on Motion to Appeal to the Court of Appeals	A25
Notice for Leave to Appeal	A27
Affidavit of Robert L. Bobrick	A29
Decision of New York Court of Appeals	A32
Decision of Court of Appeals on Motion for Leave to Appeal to Court of Appeals	A32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

SAMUEL GILBERT, *et al.*, stockholders of Glen Alden Corporation, suing on behalf of themselves and all other Stockholders of said Corporation, and for the benefit of and in the right of said GLEN ALDEN CORPORATION,

Petitioners,

against

FRANCIS O. CASE, DUDLEY G. LAYMAN, ALBERT A. LIST, ROYAL B. LORD and GLEN ALDEN CORPORATION,

Respondents.

---

* The petitioners are: Samuel Gilbert, (Dr.) William W. Kistler, Ruth D. Kistler, Westminster Presbyterian Church Memorial Fund, Garrett E. Walters, John P. McConnell, Jr., Henry Abrams, Stephen R. Abrams, Virginia Abrams, Isaac Fuchs, Peter Macium, Rose Macium, Edward Satkowski, Philip Godfrey, Morris Davidhoff, Frank B. Gass, Lucille Blazer, Hulbert T. E. Beardsley, Harry C. Keller, Joseph F. Storz, Frank Nealis and Mary Nealis, Harry S. Mauser, William A. Pollock, surviving Executor U/L/W of Estelle D. Pollock, Deceased, August B. Coleman, Milton A. Miller, William Bernhardt, Richard H. Perley, Harry G. Davis, Michael G. Spinazzola and Fannie Spinazzola, Howard V. Scotland, Howard V. Scotland, Trustee for Howard V. Scotland, Jr., David Schonberger, Clarence Akershock, Biological Research Institute, Inc., Catherine O'Connor, Arnold F. Good, Jesse E. Shetrom, Mattie H. Clark, Elmer Trethewey, Victor Beaver, Harold Proom, Col G. Atlas and Lillian G. Wrigley.

Petition for Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the two orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered:

(1) November 21, 1966 (A-1), which denied petitioners' motion (A pp. 2-10) to vacate the order of reversal made by said Appellate Division on June 12, 1961, and the judgment entered pursuant thereto on June 23, 1961, and to direct the entry of an order of affirmance of the judgment of the Supreme Court, Kings County, entered June 16, 1960, and, which was made final by the order entered,

(2) September 19, 1967 (A pp. 25-26), which denied the motion (AB pp. 27-31) of the petitioners for leave to appeal to the Court of Appeals upon certified questions of law.

Opinions Below.

No opinions were rendered by the Appellate Division in making the orders. The dispositions are not reported.

Jurisdiction.

Jurisdiction of this Court is invoked under the Fourteenth Amendment to the Constitution of the United States and 28 U. S. C., §1257(3) [since a title, right, privilege or immunity was specially set up or claimed

under the Constitution of the United States]. The order sought to be reviewed was dated and entered on September 19, 1967, thereby making final the order of November 21, 1966.

Questions Presented.

1. Where the Presiding Justice of an appellate court solicits and receives for a "charitable" organization founded and organized by himself and of which he is President, $19,625 from the chief defendant prior to argument of an appeal and $66,500 thereafter, have petitioners been deprived of "due process of law" and "equal protection of the laws" within the meaning of the 14th Amendment when they lose the appeal by a 3 to 2 vote in which the deciding vote is cast by said Presiding Justice?

2. Is Canon 25 of the Canons of Judicial Ethics of the American Bar Association requiring that "a Judge * * * should not solicit for charities" a mandatory prohibition under the "due process" and "equal protection" clauses of the 14th Amendment?

3. Where petitioners only learned of the solicitation and the payments of money 6 years after the Appellate Division decision, did the Appellate Division and the New York Court of Appeals fail to discharge their Constitutional duties under the 14th Amendment and Section 14 of the Judiciary Law of the State of New York by refusing, *without opinion*, to give petitioners any relief upon disclosure of the facts herein?

4. Did the Court below violate the rule of this Court in *Hansberry v. Lee*, 311 U. S. 32, requiring a "disinterested judge" in all class actions? (p. 45).

Constitutional Provisions, Statute and Canon Involved.

A. United States Constitutional Provisions Involved.

AMENDMENT XIV

"Section 1. * * * nor shall any State deprive any person of * * * property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

B. New York Statutory Provision Involved.

Section 14 of the Judiciary Law of the State of New York, insofar as pertinent herein, provides:

> "Disqualification of judge by reason of interest * * * A judge shall not sit as such in, or take any part in the decision of an action, claim, matter, motion or proceeding, * * * in which he is interested, * * *."

C. Canons of Judicial Ethics.

Canon 25 of the Canons of Judicial Ethics of the American Bar Association states:

> "25. * * * Solicitations for Charity.
>
> "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office *to persuade* or coerce *others to* patronize or *contribute, either* to the success of private business ventures, or *to charitable enterprises.* He should therefore not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; *he should not solicit for charities,* nor should he enter into any business relation which, in the normal course of events rea-

sonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

Statement of the Case.

Petitioners, shareholders of the corporate defendant, Glen Alden Corporation, had sued derivatively to surcharge the other defendants for waste by reason of their conduct in promulgating an illegal reorganization plan.

After a trial, petitioners recovered a judgment for $118,321.08 against the defendants, List, Lord, Layman, Case and Stokes, in the New York Supreme Court, Kings County (*Gilbert v. Burnside,* Misc. 2d , 197 N. Y. S. 2d 623).

The named defendants appealed. The appeals were heard in November, 1960, and were decided on June 12, 1961. The bench consisted of Beldock, Acting P. J.; Christ and Pette, JJ., who voted for reversal, and Ughetta and Kleinfeld, JJ., who dissented and voted to affirm the judgment and order upon the opinion of the learned Justice at Special Term (13 A. D. 2d 982, 216 N. Y. S. 2d 430).

Petitioners appealed, and the Court of Appeals of New York affirmed without opinion (11 N. Y. 2d 960, 229 N. Y. S. 2d 10).

It was later discovered (in April, 1965) that, at the time the appeal was heard in the Appellate Division, "a close personal and business relationship" existed between Mr. Justice Beldock and the principal defendant, List (A-pp. 6, 7, 8).

Petitioners moved the Appellate Division, Second Judicial Department, to vacate its order of reversal entered on June 12, 1961, and the judgment entered pursuant

thereto on June 23, 1961, and to enter an order of affirmance of the judgment of the Supreme Court, Kings County, entered on June 16, 1960 (A-pp. 2-10, 21-24).

Petitioners' Attempt to Have the Appellate Division Decide the Questions of "Due Process" and "Equal Protection."

The nature and object of the motion was as follows: That the order of reversal made by the said Appellate Division, Second Department, was utterly void by reason of the disqualification of Presiding Justice George J. Beldock, and the federal constitutional issues of "due process" and "equal protection" (A-pp. 23-24).

By bare order, the motion was denied (A-p. 1).

Through this motion it was learned for the first time (October, 1966) that respondent Albert A. List, prior to the argument in November, 1960, of the appeal from the judgment recovered against him, had contributed $19,625 to a "charitable" foundation organized and founded by Presiding Justice Beldock, and $66,500 thereafter (A-pp. 19-20).

Petitioners attempted to appeal to the New York Court of Appeals. The appeal was dismissed, upon the ground that the order appealed from does not finally determine the proceedings within the meaning of the (State) Constitution (20 N. Y. 2d 641)* (A-32).

Petitioners then moved in the New York Court of Appeals for leave to appeal to that Court. The motion was

---

* In New York, unless the judgment or order is one which finally determines an action or special proceedings, they are not appealable as of right even though a constitutional question is directly involved. *Van Arsdale v. King*, 155 N. Y. 325; *Mozarkel v. Mozarkel*, 224 N. Y. 340.

denied on the ground that the New York Court of Appeals has no jurisdiction to grant leave to appeal from a non-final judgment or order (20 N. Y. 2d 737) (A-32).

Thus, it was established that petitioners' only recourse to an appeal to the New York Court of Appeals was by permission of the Appellate Division.

Thereupon, petitioners moved the Appellate Division for leave to appeal to the Court of Appeals upon certified questions* (A-B-pp. 27-31). By order entered September 19, 1967, with Presiding Justice George J. Beldock taking part and voting, the motion was denied (A-B-pp. 25-26), without opinion. This denial exhausted petitioners' remedies and foreclosed any other and further legal recourse for petitioners in the courts of New York. It made final the order of November 21, 1966 (A-p. 1). It was the final word of a final court. *VanArsdale v. King,* 155 N. Y. 325.

Constitutional questions of "due process" and "equal protection of the laws" were seasonably raised at every stage of the proceedings herein detailed by affidavits and briefs. No answers were furnished by the Appellate Division to the constitutional questions and issues raised by petitioners.

There remains available no review or correction of the orders of the Appellate Division, except by this Court.

---

* The motion was pursuant to Article VI, Section 3, subdivision 4, of the Constitution of the State of New York, supplemented by New York Civil Practice Law and Rules 5602 (B) (I).

Reasons for Granting the Writ.

I.

The admitted conduct of Presiding Justice Beldock in accepting prior to argument $19,625 for a so-called "charitable" organization of which he was founder, organizer and President, from respondent and chief defendant Albert A. List violates "the equal protection of the laws" and "due process" clauses of the 14th Amendment, and is squarely within the prohibition of Canon 25 of the Canons of Judicial Ethics of the American Bar Association requiring that "a Judge * * * should not solicit for charities."

Respondents have in effect admitted by their failure *under oath* to assert to the contrary that

1. Petitioners did not learn of the $19,625 payment by respondent Albert A. List to a "charitable" foundation organized and founded by Presiding Justice Beldock, until October 19, 1966, when List so admitted in an affidavit below (A-pp. 19-20), some five years or more since the argument of the appeal in which Justice Beldock cast the deciding 3-2 vote *against* petitioners (A-pp. 7-9).

2. The only remark allegedly made by Justice Beldock at the oral argument was, to quote respondents, "that he was interested in a charitable organization in which one of the defendants, Mr. List, was also interested" (A-pp. 12-18). He did not disclose that his "interest" was that of "organizer and founder" and "recipient" of monies donated by List prior to the oral argument to a "foundation" of which the Judge was president.*

---

* To be "interested" in something does not mean that one is president of, and has founded and organized it and solicited funds for it which have been donated to it. The casual manner of stating he was "interested", if he did so state, was thus totally misleading at the time by omission of material facts that under Canon 25 showed his disqualification, and a disqualification that under Section 14, Judiciary Law of the State of New York could not be waived (pp. 10-11, *infra*).

Canon 25 of the *Canons of Judicial Ethics of the American Bar Association,* provides:

Solicitation for Charity.

"A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office *to persuade* or coerce *others to* patronize or *contribute, either* to the success of private business ventures, or *to charitable enterprises.* He should therefore not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; *he should not solicit for charities,* nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

II.

The disqualification of Mr. Justice Beldock rendered the order of reversal of June 12, 1961, of the Appellate Division utterly void and the refusal of that Court to vacate it did not conform with "due process" and "equal protection" of petitioners as minority stockholders in a class action.

Hansberry v. Lee, 311 U. S. 32;
Tumey v. Ohio, 273 U. S. 510.

New York State's Judiciary Law, Section 14, as pertinent here, provides:

"Disqualification of judge by reason of interest.

"• • • A judge shall not sit as such in, or take any part in the decision of an action, claim, matter, motion or proceeding, • • • in which he is interested, • • •."

The word "interest" as used in Judiciary Law, Section 14, clearly includes conduct prohibited by Canon 25 of the Canons of Judicial Ethics. Such conduct is automatic disqualification and not subject to waiver.

It makes a mockery of the Judiciary Law to suggest, as do respondents below, that it sanctions an "interest" of the explicit kind prohibited by the Canons of Judicial Ethics. Such an "interest" as a matter of law makes a Judge "biased" in favor of the donor and is the obvious reason for the prohibition of Canon 25. It has long been settled that a Judge who is "biased" in favor of one party is disqualified under Section 14. *Moers v. Gilbert,* 175 Misc. 733, aff'd 261 App. Div. 957, and other cases therein cited. The disqualification is automatic, may not be waived, is absolute and deprives the Judge or Court of jurisdiction. *Oakley v. Aspinwall,* 3 N. Y. 547; *Low v. Rice,* 8 Johnson 409.

Counsel has the right to assume that a Judge before whom he appears is honest and impartial. Mr. Justice Frankfurter said in *Bridges v. California,* 314 U. S. 252, 382:

> **"The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed * * * a judicial system which does not provide disinterested judges. *Tumey v. Ohio,* 273 U. S. 510, * * *."**

The 14th Amendment to the Constitution of the United States requires that each party litigant be given "equal protection under the law." To allow one litigant to donate $19,625 prior to oral argument to a "charitable enterprise" (Canon 25) "organized and founded by the Pre-

siding Justice" without automatically disqualifying that Judge—who thereafter casts the deciding 3-2 vote, which takes away from petitioner stockholders their $118,321.08 judgment—is to deprive the opposing litigant of "equal protection."* He has no way of offsetting that "bias" unless to donate an equal or larger sum, a practice that would result in exposing justice to the charge it was on sale by indirect methods of purchase. To uphold the practice here revealed is to deprive the small shareholders both of "equal protection" and of "due process of law"—terms that include a "disinterested judge." *Tumey v. Ohio,* 273 U. S. 510, cited in *Bridges v. California,* 314 U. S. 252, 283.

CONCLUSION.

The petition for a writ of certiorari should be granted. The orders of the Appellate Division, Second Department, dated September 19, 1967, November 21, 1966 and June 12, 1961, should be vacated and the judgment entered on June 23, 1961 vacated, and an order of affirmance directed to be entered of the judgment petitioners recovered in the Supreme Court of the State of New York, County of Kings, and entered on June 16, 1960.

Respectfully submitted,

ROBERT L. BOBRICK,
Attorney for Petitioners.

---

* Except for the vote of the Presiding Justice, Petitioners' judgment below would have been affirmed by a 2-2 vote. The fact that the New York Court of Appeals affirmed the reversal is of no avail to Respondents, since it did not know that the decision of the Presiding Justice had been purchased. *Seward v. Tasker,* 143 N. Y. S. 264 quoted in appendix, page A-23.